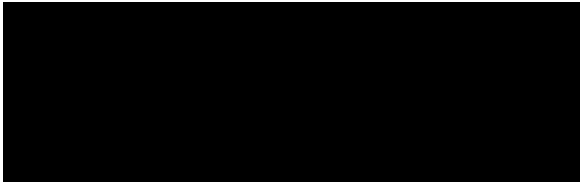




U.S. Citizenship
and Immigration
Services

Administrative Review related to
division of personnel review

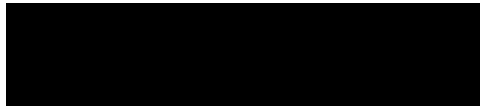
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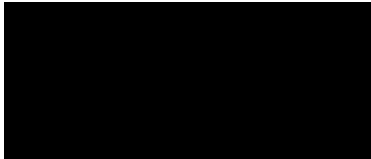
File: SRC-03-183-54396 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its President as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Texas that operates a book and media store. The petitioner claims that it is the subsidiary of Shenyang City Shancheng Constructional Engineering Co., Ltd., located in Shenyang, China. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence of record shows that that beneficiary will be employed in a managerial or executive capacity. In support of this assertion, counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be

acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition filed on June 19, 2003, the petitioner stated that the beneficiary's job duties include "[directing and executing] all orders and resolutions of the board of directors; exercis[ing] discretion over the daily operation of the company; direct[ing] the management of the company; [and] establish[ing] the goals and policy of the company." A letter from the foreign entity, dated March 26, 2002, states that "[the beneficiary] will direct regular affairs for [the petitioner]." On Form I-129, in part 5 where the petitioner is requested to provide a nontechnical description of the beneficiary's job, the petitioner states "please see the petitioner letter." However, the record contains no letter or additional documentation that further discuss the beneficiary's position.

On June 25, 2003, the director requested additional evidence. Regarding the beneficiary's employment capacity, the director requested a current organizational chart for the petitioner and photos of the petitioner's store.

In a response dated August 4, 2003, the petitioner submitted the petitioner's current organizational chart and photographs of its retail establishment.

On August 13, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated:

[The petitioner] only has two employees who both earn the same amount of money. The pictures of the bookstore show a store with a substantial amount of inventory. It must be concluded that [the beneficiary] is actually working in the bookstore. As one of only two employees, while she is almost certainly directing the management of the store she is also helping to carry out the day-to-day activities of sales, stocking, ordering, billing, etc. [The petitioner has] failed to prove that [the beneficiary] meets the definition of a manager or executive as defined in the regulations.

On appeal, counsel for the petitioner asserts that the evidence of record shows that that beneficiary will be employed in a managerial or executive capacity. Counsel states that the petitioner employs individuals in addition to the beneficiary, and the petition should not be denied due to a small staff. On Form I-290B, counsel provides that "[the petitioner] sometimes use[s] contract [sic] workers to avoid more paperwork and filing matters." In support of these assertions, counsel submits a brief and additional evidence pertaining to activity that occurred after the date of filing the petition. In the brief, counsel states:

Petitioner submits attached documents which clearly demonstrate that [the beneficiary's] function is to manage the organization consisting of book/video and CD departments. [The beneficiary] supervises and controls not only the work of others, but also oversees essential functions within the organization, such as the purchase of new products, hiring and firing of employees and all day-to-day operations and activities of other employees. . . . [The beneficiary] is directly related to the affairs of the company and truly is in a managerial position.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In the instant matter, beneficiary's job description is brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the statement that the beneficiary is responsible for "[directing and executing] all orders and resolutions of the board of directors; exercis[ing] discretion over the daily operation of the company; direct[ing] the management of the company; [and] establish[ing] the goals and policy of the company" provides no indication of the actual tasks the beneficiary will perform on a daily basis. The statement that "[the beneficiary] will direct regular affairs for [the petitioner]" fails to identify any specific duty the beneficiary will perform, managerial or otherwise.

In his brief, counsel supplements the record regarding the beneficiary's job description, however, counsel's description adds little to establish a clear record of the beneficiary's proposed activities. Counsel states that the beneficiary "supervises and controls not only the work of others, but also oversees essential functions within the organization, such as the purchase of new products, hiring and firing of employees and all day-to-day operations and activities of other employees." The only duty which is clearly articulated by this statement is the ordering of new products, yet this is not a qualifying managerial or executive task. Counsel indicates that the beneficiary will hire and fire employees, yet, considering the petitioner employs one individual in addition to the beneficiary, this duty clearly does not consume much of the beneficiary's time such that she is *primarily* engaged in managerial or executive tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job description does not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

On appeal, the petitioner submits sales contracts and purchase orders with the beneficiary's signature to support that she is making official decisions and thus acting in a managerial capacity. However, all of these documents were executed after the date of filing the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Thus, as these documents relate to activity that occurred after the date of filing the petition, they are not probative of the petitioner's eligibility as of the date of filing.

Further, the petitioner submits evidence of hiring two new workers after the date of filing the petition. Counsel asserts that this documentation shows that the beneficiary is acting in a managerial capacity by supervising a total of three employees. However, as noted above, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. The fact that the petitioner hired additional workers after the date of filing does not support that the beneficiary was acting in a managerial capacity as of the date of filing.

Counsel provided on Form I-290B that "[the petitioner] sometimes use[s] contract [sic] workers to avoid more paperwork and filing matters." The petitioner has provided no evidence of utilizing the services of contract labor. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel correctly observes that a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The petitioner operates a book and media store. Thus, it is evident that it requires its employees to perform numerous non-managerial tasks such as ordering merchandise, stocking shelves, tracking inventory, answering questions from customers, operating a cash register to conduct sales transactions, managing a checkbook and paying routine bills, and providing custodial services. The petitioner employs two individuals including the beneficiary. As noted on the petitioner's addendum to Form I-129, both of the petitioner's employees, including the beneficiary, are in L-1A status. Further, as noted by the director, both employees are compensated at the same rate of \$24,000 per year, undermining a finding that the beneficiary supervises

the other employee. The petitioner has not described how the significant non-qualifying duties listed above will be performed by two multinational managers or executives both acting in a primarily managerial or executive capacity. Thus, the reasonable needs of the petitioner reflect that the beneficiary will be required to invest a substantial portion of her time in performing the tasks necessary to provide the petitioner's services. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner's organizational chart indicates that it plans to hire additional managers and employees in the future. However, once again the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the appeal will be dismissed.

Beyond the decision of the director, counsel has not established that the petitioner has a qualifying corporate relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

On Form I-129, the petitioner indicated that it is the subsidiary of the beneficiary's foreign employer. As evidence of the ownership of the petitioner, it submitted a stock certificate, its articles of incorporation, and a one-page entry from a log recording the stock certificate. The stock certificate reflects that, on April 16, 2002, the foreign entity acquired 50,000 shares of the petitioner's stock. However, the articles of incorporation and stock certificate reveal that the petitioner is authorized to issue a total of 1,000,000 shares. While the petitioner submitted a page ostensibly from a stock register that records the stock certificate, the record does not establish that it represents the complete stock register. Thus, the petitioner has not shown whether additional shares have been issued. As the shares owned by the foreign entity number far less than the potential number of outstanding shares, the petitioner has failed to establish that the foreign entity owns a controlling interest. Thus, the record is insufficient to show a qualifying corporate relationship. For this additional reason, the appeal will be dismissed.

Also beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. 8 C.F.R. § 214.2(l)(14)(ii)(B). The petitioner submits a number of documents of its business activity that occurred after June 19, 2003, the date of filing the petition. Regarding the one-year period prior to the date of filing, the petitioner provided two merchandise invoices and a shipping invoice, dated in May and June 2003. The petitioner submitted bank statements for April and May 2003, 2002 year-end tax filings, a financial statement, and quarterly filings for the fourth quarter of 2002 and the first quarter of 2003. Yet, while the invoices establish some sales activity in May and June 2003, the petitioner's documents are not sufficient to show the regular, systematic, and continuous provision of goods and/or services from August 2002 to June 2003. For this additional reason, the petition will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.